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July 24, 2009

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: **REDACTED FOR PUBLIC INSPECTION**
TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation
File No. CSR-8001-P

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), by its attorney, hereby submits a copy of its Proposed Recommended Decision that has been redacted to protect information designated as confidential or highly confidential by the parties. Consistent with the schedule set by the Presiding Judge, Comcast filed the original under seal with the Office of the Secretary on July 20, 2009 pursuant to the Protective Order entered February 18, 2009 in this proceeding. Please contact the undersigned if you have questions regarding this submission.

Sincerely,

/s/ David H. Solomon_____
David H. Solomon

Encl.

CERTIFICATE OF SERVICE

I, William R. Layton, hereby certify that on July 24, 2009, a copy of the attached Proposed Recommended Decision was delivered by email to the following:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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Washington, DC 20554

/s/ William R. Layton
William R. Layton

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TCR Sports Broadcasting Holding, L.L.P.,	)	MB Docket No. 08-214
d/b/a Mid-Atlantic Sports Network,	)	
Complainant	)	
	)	File No. CSR-8001-P
v.	)	
	)	
Comcast Corporation,	)	
Defendant	)	

APPEARANCES

David C. Frederick, Esq., Wan J. Kim, Esq., Evan T. Leo, Esq., and Kelly P. Dunbar, Esq. *on behalf of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network*; David H. Solomon, Esq., L. Andrew Tollin, Esq., Robert G. Kirk, Esq., J. Wade Lindsay, Esq., James L. Casserly, Esq., Michael H. Hammer, Esq., Megan Stull, Esq., Michael Hurwitz, Esq., Michael P. Carroll, Esq., David B. Toscano, Esq., Arthur J. Burke, Esq., *on behalf of Comcast Corporation*; Kris Anne Monteith, Esq., William F. Davenport, Esq., Gary Schonman, Esq., and Elizabeth Mumaw, Esq., *on behalf of the Enforcement Bureau*

RECOMMENDED DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: **Released:**

PRELIMINARY STATEMENT

1. This Recommended Decision is issued in response to the Memorandum Opinion and Hearing Designation Order[1] ("*HDO*") referring the above-captioned program carriage

[1] *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc. et al.*, MB Docket 08-214, *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd 14787, 14845 ¶ 142 (MB 2008) ("*HDO*"); *see also Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, MB Docket 08-214, *Memorandum Opinion and Order*, FCC 08M-47, 2008 FCC LEXIS 9186, at ¶ 8 (ALJ rel. Nov. 20, 2008), *as modified by Erratum* (ALJ rel. Nov. 21, 2008) (together, "*November 20 MO&O*") (modifying the issues designated for hearing).

dispute to an Administrative Law Judge ("ALJ") and directing the ALJ to return a Recommended Decision in these matters to the Commission. As a preliminary matter, the Presiding Judge finds that the evidence presented at trial demonstrates conclusively that the complaint is time-barred by the applicable statute of limitations and is barred by the doctrine of *res judicata*. The Presiding Judge, therefore, recommends that the Commission dismiss with prejudice TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network's ("MASN") complaint against Comcast Corporation ("Comcast").

2. To the extent that the Commission deems it appropriate to reach the merits of MASN's program carriage complaint, the Presiding Judge finds that (i) MASN failed to meet its burden to prove that Comcast unlawfully discriminated in the selection, terms or conditions of carriage of video programming provided by MASN on the basis of affiliation or non-affiliation, and (ii) in any event, the record does not demonstrate that Comcast unreasonably restrained MASN's ability to compete fairly in violation of Section 76.1301(c) of the Commission's program carriage rules.[2] Consequently, mandatory carriage of MASN's programming service on Comcast's systems is not warranted. The Presiding Judge recommends that the Commission deny the above-captioned carriage complaint.

PROCEDURAL HISTORY

3. This case involves a program carriage complaint filed by MASN against Comcast on July 1, 2008, under Section 76.1301(c) of the Commission's rules. Specifically, MASN alleges that Comcast unlawfully refused to carry MASN's programming on certain Comcast systems, principally within the Roanoke-Lynchburg Designated Market Area ("DMA") and Tri-Cities DMA in southwestern Virginia, and portions of the Harrisburg-Lancaster-Lebanon-York DMA in Pennsylvania.

4. After reviewing the initial pleadings, the Media Bureau issued the *HDO* designating this case for hearing before an ALJ.[3] The *HDO* designated for hearing the following issues, as modified by the Presiding Judge on November 20, 2008 to reflect more accurately the language of Section 76.1301(c)(3):

> (a) whether the defendant engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c);

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[2] 47 C.F.R. § 76.1301(c).

[3] The *HDO* addressed a total of six separate complaints involving three different complainants and four different defendants. The cases were subsequently separated into three separate proceedings. The instant Recommended Decision is limited to the proceeding addressing MASN's program carriage complaint against Comcast.

(b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), whether mandatory carriage of the complainant's programming on the defendant's system is necessary to remedy the violation and, if so, the prices, terms, and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends.[4]

5. The Commission subsequently directed that the Presiding Judge "shall issue [his] recommended decision[] and remed[y], if any, to the Commission as expeditiously as possible, consistent with the mandates of fairness and due process."[5]

6. Shortly after the release of the *HDO*, the Presiding Judge issued an Order finding that MASN bears the burden of proceeding with the introduction of evidence and the burden of proof with respect to the designated issues.[6] In his November 20, 2008 Order, the Presiding Judge also clarified that the evidence adduced at the hearing will be given *de novo* consideration.[7]

7. Following the completion of discovery and the submission of trial briefs, written direct testimony and trial exhibits, the hearing was held from May 18 through May 26, 2009. Following conclusion of the hearing, MASN and Comcast submitted proposed findings of fact and conclusions of law, proposed reply findings of fact and conclusions of law, a joint glossary of terms, and proposed recommended decisions. The Enforcement Bureau submitted post-hearing comments.

ARGUMENTS

MASN

8. MASN asserts that this case is about Comcast's refusal in 2007 and 2008 to carry MASN on all systems within MASN's territory.[8] MASN argues that its burden of establishing a *prima facie* case was satisfied by the *HDO* and, therefore, the burden of proof has shifted to

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[4] *HDO,* 23 FCC Rcd at 14845 ¶ 142, as modified in *November 20 MO&O*, FCC 08M-47 at ¶ 8, *Erratum* at ¶ 2.

[5] *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, MB Docket 08-214, *Order*, 24 FCC Rcd 1581, 1582 (2009) ("*January 27 Order*").

[6] *Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc. et al.*, MB Docket 08-214, *Order*, FCC 08M-44, at 2 (ALJ rel. Oct. 23, 2008) ("*October 23 Order*"); *see also November 20 MO&O* at ¶ 6 (MASN must "present, and prove" its case).

[7] *November 20 MO&O* at ¶¶ 6, 8.

[8] MASN's Proposed Findings of Fact and Conclusions of Law at 108, ¶ 90 ("MASN PFC") (stating that "MASN's current Complaint is based upon Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007").

Comcast to demonstrate that its conduct was motivated by legitimate business reasons.[9] MASN contends that the record evidence demonstrates that (i) it is similarly situated to Comcast's affiliated regional sports networks ("RSNs"),[10] (ii) Comcast discriminated against MASN on the basis of affiliation or non-affiliation,[11] and (iii) Comcast's discriminatory conduct has undermined MASN's ability to compete fairly.[12]

9. MASN has adopted a novel approach to proving its case. First, it makes allegations regarding Comcast's conduct prior to the execution of a 2006 settlement agreement ("2006 Settlement Agreement") between the parties that resolved a prior carriage complaint.[13] When Comcast attempts to demonstrate that these allegations are barred by *res judicata* and the statute of limitations, MASN responds that Comcast's arguments are incorrect because the Complaint relates to conduct in 2007 and 2008.[14] When Comcast provides evidence and testimony to rebut allegations regarding 2007 and 2008, MASN responds that this evidence is irrelevant because it does not relate to the carriage decisions Comcast made in 2006.[15]

Comcast

10. Comcast argues that this case is a collateral challenge by MASN to the 2006 Settlement Agreement.[16] The 2006 Settlement Agreement, which included a carriage contract, provided MASN with carriage to approximately 87 percent of Comcast's subscribers within

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[9] MASN PFC at 77-78 ¶ 12.

[10] *Id.* at 85-87 ¶¶ 27-34.

[11] *Id.* at 87-92 ¶¶ 35-47.

[12] *Id.* at 101-06 ¶¶ 71-84.

[13] *Id.* at 19-40 ¶¶ 51-91; MASN Proposed Reply Findings of Fact and Conclusions of Law at 5-10 ¶¶ 163-74 ("MASN RFC") (discussing 2006 negotiations), 12-13 ¶¶ 180-83 (regarding alleged oral representations in 2006); 15-18 ¶¶ 188-196 (arguments regarding pre-2007); *see* Comcast's Reply Findings of Fact and Conclusions of Law ("Comcast RFC") at 4-6 ¶¶ 1-6.

[14] MASN RFC at 55 ¶ 156 (responding to Comcast's claim that this case is about the 2006 Settlement Agreement by stating "This case is about Comcast's discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007"), 57 ¶ 159 (stating that "the Complaint unambiguously seeks to hold Comcast liable for its discriminatory refusal to carry MASN in the Foreclosed Areas since January 2007") (internal quotations omitted).

[15] MASN RFC at 18 ¶ 197 (stating that "Each of the three emails that Comcast cites (at ¶ 93 n.255) to support this claim was written in 2007 and 2008 – long after the carriage negotiations in August 2006"), 19 ¶ 198 (noting that evidence submitted by Comcast to justify actions in 2007-2008 is "unreliable" because it does not "show what actually motivated Comcast to 'carve off' territories in August 2006."), 44 ¶ 133 (stating that "Comcast's defense is pretextual [because] this issue was not raised until 2007 . . ."), 45 ¶ 135 (stating that "the [demand] defense is pretextual . . . the demand defense was first raised only in 2007").

[16] Comcast's Proposed Findings of Fact and Conclusions of Law at 2-3 ("Comcast PFC").

MASN's territory, and Comcast asserts that MASN's Complaint seeks to change the terms of the 2006 Settlement Agreement to require carriage to 100 percent of Comcast's subscribers within MASN's territory.[17] Accordingly, Comcast argues that the Complaint is barred by the one-year statute of limitations in the program carriage rules and the doctrine of *res judicata*.[18]

11. Comcast further claims that, to the extent that MASN's argument that the case is really about Comcast's actions starting in January 2007 is accepted, MASN bears the burden of proving its case and has failed to do so.[19] Comcast notes that less than one page of MASN's proposed findings of fact relates to the post-2006 period, and even those few sentences do not cite any evidence of discrimination.[20] Moreover, Comcast asserts that MASN has failed to establish that it is similarly situated to Comcast's affiliated RSNs.[21] Comcast also states that the record evidence demonstrates that when MASN demanded carriage on all Comcast systems within MASN's footprint in 2007 and 2008, Comcast relied on the 2006 Settlement Agreement as the basis for not carrying MASN.[22] Comcast contends that reliance on a settlement agreement is not only reasonable and non-discriminatory, but fully consistent with Commission policies encouraging negotiated resolution of disputes.[23] Finally, Comcast maintains that, even if MASN were able to demonstrate discrimination on the basis of affiliation or non-affiliation, it has failed to demonstrate that such discrimination unreasonably restrained its ability to compete fairly.[24]

WITNESSES

MASN's Witnesses

12. MASN presented the testimony of the following witnesses: James Cuddihy, Executive Vice President of Marketing, Programming, Affiliate Relations for MASN; Mark Wyche, a sports media consultant; David Gluck, an attorney and business consultant for RSNs; and Hal Singer, an economist.

Comcast's Witnesses

13. Comcast presented the testimony of the following witnesses: Madison ("Matt") Bond, Executive Vice President of Content Acquisition for Comcast Cable; Michael Ortman, Vice President for Programming for Comcast Cable's Eastern Division, which includes Comcast cable systems in Virginia, Maryland, the District of Columbia, Delaware, New Jersey,

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[17] Comcast PFC at 40-44 ¶¶ 82-88.

[18] *Id.* at 62-69 ¶¶ 124-35.

[19] *Id.* at 69-70 ¶ 136; Comcast RFC at 50-53 ¶¶ 77-82.

[20] Comcast RFC at 5-6 ¶¶ 2-3.

[21] Comcast PFC at 87-88 ¶¶ 170-71.

[22] *Id.* at 40-44 ¶¶ 82-88.

[23] *Id.* at 82-83 ¶ 163, 90-94 ¶¶ 178-183; Comcast RFC at 56-59 ¶¶ 89-94.

[24] Comcast PFC at 94-97 ¶¶ 184-191; Comcast RFC at 59-60 ¶¶ 95-96.

Pennsylvania, Ohio, and West Virginia; Jonathan Orszag, an economist; and Larry Gerbrandt, Principal, Media Valuation Partners.

FINDINGS OF FACT

14. The record in this case consists of oral and written testimony, other documentary evidence, and numerous pleadings. The Presiding Judge has reviewed the entire record in issuing this Recommended Decision.

The Parties

15. Comcast is a vertically integrated Multichannel Video Programming Distributor ("MVPD"), as that term is defined in 47 C.F.R. § 76.1300(d). Comcast's business consists primarily of two groups, the Cable Group and the Programming Group, which operate as separate profit centers, with different budgets, goals, performance results, and employees.[25]

16. Comcast's Cable Group operates Comcast's cable systems that distribute video programming to subscribers.

17. Comcast's Programming Group operates the programming networks owned or managed by Comcast, including the two RSNs that MASN asserts are relevant in this case, Comcast SportsNet Philadelphia, L.P. ("CSN-P") and Comcast SportsNet Mid Atlantic, L.P. ("CSN-MA").[26] CSN-P airs games of Major League Baseball's ("MLB") Philadelphia Phillies, the National Hockey League's ("NHL") Philadelphia Flyers, and the National Basketball Association's ("NBA") Philadelphia 76ers. CSN-MA airs games of the NHL's Washington Capitals and the NBA's Washington Wizards. CSN-MA also carries selected basketball games of the National Collegiate Athletic Association's ("NCAA") Atlantic Coast Conference ("ACC") and a variety of other college athletic conferences, as well as additional sports programming.[27] Until the 2007 MLB season, CSN-MA had the rights to telecast the Baltimore Orioles games.[28]

18. MASN is an RSN vertically integrated with the Baltimore Orioles and Washington Nationals, which holds the television rights to Orioles and Nationals games. It began operations in 2005 and, at that time, only carried Nationals games. In the 2007 MLB season, MASN also began carrying Orioles games.[29] Because MASN carries two MLB teams

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[25] Tr. 6975:2-10, 6978:21-6979:5, 6979:21-6981:21 (Bond).

[26] Comcast Exh. 2 at 2 ¶¶ 3-4, 7 ¶ 17 (Ortman).

[27] CSN-MA carries ACC basketball games both through a direct licensing agreement with the ACC and by sublicensing games through Fox Sports, which holds the rights to a large number of games. Tr. 7435:2-7438:14, 7453:11-19 (Gerbrandt).

[28] Comcast Exh. 1 at 11 ¶ 31 (Bond); Comcast Exh. 2 at 8 ¶ 19 (Ortman); MASN Exh. 235 at 2 ¶ 3 (Cuddihy); *see* MASN Exh. 141 at 13 (presentation).

[29] MASN Exh. 235 at 2 ¶¶ 3-4 (Cuddihy).

that frequently have games scheduled at the same time, MVPDs that carry MASN often are required to devote two channels simultaneously to the network.[30]

2006 Settlement Agreement and Release

19. In August 2006, Comcast and MASN executed a Settlement Agreement entitled "Affiliate Term Sheet between TCR SPORTS BROADCASTING HOLDING, L.L.P. ('TCR') trading as Mid-Atlantic Sports Network ('MASN'), on one hand, and COMCAST CORPORATION, on the other hand."[31] The Settlement Agreement included as an addendum a "Mutual Release" (hereinafter "Release").[32] The Settlement Agreement and Release were executed simultaneously.

20. The Settlement Agreement resolved a number of disputes between MASN and Comcast related to the television rights and carriage of the Baltimore Orioles games. By early 2005, MASN was planning to take over the Orioles television rights starting in 2007. At that time Comcast had the television rights to the Orioles games and carried those games on CSN-MA. Comcast was seeking to retain those rights to which it believed it was contractually entitled and eventually filed a civil suit against MASN.[33] MASN and Comcast had initial discussions about carriage of MASN's programming network and MASN requested carriage on all Comcast systems within the MASN territory.[34] These negotiations were unsuccessful[35] and MASN filed a program carriage complaint with the Commission against Comcast in June 2005 seeking carriage on all Comcast systems throughout MASN's territory.[36]

21. At the time MASN filed its 2005 Complaint, Comcast was seeking Commission approval of its application, along with Time Warner Cable (together, "Applicants") to acquire licenses associated with certain cable systems from the bankrupt Adelphia Communications Corp. ("Adelphia").[37] On July 21, 2005, MASN filed a petition urging the Commission to

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[30] *E.g.,* Comcast Exh. 5 at 2 (Settlement Agreement, "Channel 2").

[31] *Id*. The phrase "Term Sheet" is also used to describe the Agreement in some exhibits.

[32] *Id.* at 16.

[33] *Id.* at 10, 19-22.

[34] Tr. 6053:14-19, 6054:11-17 (Gluck).

[35] MASN Exh. 237 at 3-4 ¶¶ 11-13 (Gluck).

[36] *TCR Broadcasting Holding, L.L.P. v. Comcast Corporation,* CSR-6911-N, MB Docket No. 06-148, Carriage Agreement Complaint (filed June 14, 2005) ("2005 Complaint"). The Presiding Judge hereby takes official notice of the 2005 Complaint.

[37] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc.; Adelphia Communications Corp. to Comcast Corp., Comcast Corp. to Time Warner Inc., Time Warner Inc. to Comcast Corp.*, MB Docket 05-192, *Memorandum Opinion and Order*, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*").

impose carriage conditions on the Applicants' pending applications.[38] The Commission issued its *Adelphia Order* authorizing the Applicants' acquisition of the Adelphia systems on July 21, 2006. The *Adelphia Order* contained a condition that allowed RSNs unaffiliated with the Applicants to invoke commercial arbitration of certain carriage disputes against the Applicants "within 30 days after the denial of carriage or within ten business days after release of this Order, whichever is later."[39] Shortly thereafter, on July 31, 2006, the Commission released an order designating the MASN program carriage complaint for hearing. The order confirmed that MASN was entitled to elect arbitration pursuant to the *Adelphia Order's* condition and stayed the hearing until August 4, 2006, when MASN's right to elect arbitration expired.[40]

22. On August 4, 2006, David L. Cohen, Executive Vice President of Comcast Corporation, and Peter G. Angelos, President of Baltimore Orioles, Inc., for Baltimore Orioles Limited Partnership, the managing partner in MASN, each executed the Settlement Agreement and the associated Release.[41] Mr. Cohen and Mr. Peter Angelos both initialed every page of the Settlement Agreement and its various schedules and addenda. The Settlement Agreement states that it is entered into as settlement of MASN's then-pending program carriage complaint and related claims against Comcast and Comcast's pending civil suit over the rights to televise Orioles games.[42]

23. The Settlement Agreement obligates Comcast to carry MASN's programming network on 60 Comcast cable systems listed in Schedule A to the Settlement Agreement.[43] The Settlement Agreement contains additional language that permits, but does not require, Comcast systems "other" than those listed in Schedule A to carry MASN's programming network at Comcast's discretion.[44]

24. The systems enumerated in Schedule A to the Settlement Agreement include over 2.2 million Comcast subscribers, representing about 87 percent of Comcast's subscribers in

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[38] MASN Exh. 226 (official notice exhibit).

[39] *Adelphia Order*, 21 FCC Rcd at 8287-88 ¶ 190. In 2007, the Commission indefinitely suspended the program carriage arbitration condition adopted in the *Adelphia Order*, an action the Commission has not since revisited. *Petition for Declaratory Ruling That The America Channel Is Not A Regional Sports Network*, 22 FCC Rcd 17938, 17938 ¶ 1, 17946-47 ¶ 24 (2007).

[40] *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, MB Docket 06-148, *Memorandum Opinion and Hearing Designation Order*, 21 FCC Rcd 8989, 8995 ¶¶ 13-15 (2006) ("*2006 HDO*"); Comcast Exh. 1 at 4 ¶ 11 (Bond).

[41] Comcast Exh. 5 at 11, 20-21.

[42] *See id.* at 10, 20-21.

[43] *Id.* at 1.

[44] *Id.*

MASN's territory at the time the Settlement Agreement was executed.[45] Schedule A lists (a) the Comcast systems alphabetically by system name, (b) the MASN region in which the system is located, (c) the state in which each system is located, and (d) the estimated number of subscribers in that system.[46] The systems listed in Schedule A are organized into Section I and Section II according to the date upon which Comcast agreed to launch, or initiate carriage, of MASN's programming network. Section I lists those systems on which Comcast agreed to launch MASN "by September 1, 2006." These systems included Comcast systems within the core Baltimore and Washington DMAs. Section II lists those systems on which Comcast agreed to launch MASN "by April 1, 2007." A footnote in Section II states that "Comcast may delay the launch of the Service on Systems comprising up to 150,000 subscribers to not later than April 1, 2008." It is undisputed that Schedule A does not contain any listing for, or reference to, Harrisburg, Pennsylvania; Roanoke-Lynchburg, Virginia; or Tri-Cities, Virginia.[47] It also is undisputed that Schedule A includes 24 systems that Comcast acquired in the Adelphia transaction.[48]

25. The Settlement Agreement contains representations and warranties.[49] There is no dispute that these representations and warranties provide no assurance (a) that the systems listed in Schedule A represent all Comcast systems in MASN's territory, (b) that the number of subscribers appearing in Schedule A represent all of Comcast's subscribers in MASN's territory, (c) regarding Comcast's plans or obligations to upgrade systems in MASN's territory, or (d) regarding if, when, where, or how Comcast might agree to launch MASN programming on systems other than those in Schedule A.[50]

26. The Settlement Agreement and the associated Release both contain integration clauses that expressly limit the parties' rights and obligations to those stated in the written Agreement, superseding and replacing all prior negotiations, agreements or understandings between the Parties, whether written or oral.[51] The Settlement Agreement and the separate Release also contain language releasing Comcast and MASN from any liability arising from the

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[45] Comcast Exh. 1 at 6 ¶ 15, 2 ¶ 5 (Bond). At the direction of the Presiding Judge, an updated list of Unlaunched Systems and the associated subscribers was prepared by MASN and verified by Mr. Ortman. This list, which has been received into evidence as Joint Exh. 001, indicates that the number of Comcast subscribers in the Unlaunched Systems that do not receive MASN has been reduced. *See* Joint Exh. 001.

[46] Comcast Exh. 5 at 12-13 (Settlement Agreement and Release).

[47] *See, e.g.,* Tr. 5660:21 - 5661:4; 5655:11-14 (Cuddihy).

[48] Comcast Exh. 2 at 4 ¶ 10, 9-10 ¶ 22 (Ortman).

[49] Comcast Exh. 5 at 8-9 (Settlement Agreement and Release).

[50] One of MASN's principal negotiators testified that representations and warranties could have been used to provide certainty regarding which systems were required to launch. Tr. 6095:14–18 (Gluck).

[51] Comcast Exh. 5 at 9 (Settlement Agreement and Release); *id.* at 22-23.

litigation over carriage of Orioles games (including litigation of claims before the Commission and civil litigation), whether the claim was known or unknown prior to August 4, 2006.[52]

The Unlaunched Systems

27. It is undisputed that Comcast has met its obligations to launch MASN on the systems listed in Schedule A and is distributing MASN on the vast majority of its cable systems in MASN's territory covering 2.2 million Comcast subscribers.[53] It is also undisputed that Comcast does not carry MASN on certain of its systems within MASN's territory covering approximately 13 percent of Comcast subscribers.[54] The systems on which Comcast is not carrying MASN are not listed in Schedule A.[55] Comcast's Harrisburg system and its systems in the Roanoke-Lynchburg and Tri-Cities DMAs account for the vast majority of the Comcast subscribers that do not receive MASN.[56]

Formation of the 2006 Settlement Agreement

28. The parties negotiated the Settlement Agreement during the period following release of the Commission's *Adelphia Order* and before the deadline by which MASN's right to elect arbitration expired. Specifically, on July 25, 2006, MASN sent Comcast a proposal seeking carriage on all Comcast systems.[57] Comcast devoted significant time and resources to evaluating MASN's proposal and developing a counter-proposal during the period July 25, 2006 until August 2, 2006.[58] The evidence demonstrates that Comcast intended to develop a counter-offer that limited carriage based on costs, demand, and bandwidth, but also met MASN's subscriber

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[52] *Id.* at 10; *id.* at 20-22.

[53] Comcast Exh. 2 at 4 ¶ 10, 14 ¶ 34 (Ortman); Tr. 5978:9-13 (Wyche).

[54] Comcast Exh. 4 at 22 ¶ 40, 24 ¶ 44 (Orszag). Based on the data set forth in Schedule A, systems representing approximately 13 percent of Comcast's subscribers within MASN's territory were not launched. Comcast Exh. 1 at 2 ¶ 5 (noting Schedule A mandated carriage to approximately 87 percent of Comcast's subscribers within MASN's territory); MASN Exh. 235 at 9 ¶ 29 (Cuddihy). As discussed above, however, this figure has been reduced. *See* Joint Exh. 001 at 2.

[55] *Compare* Joint Exh. 001 at 2 *with* Comcast Exh. 5 at 12-13.

[56] *See* Joint Exh. 001; MASN Exh. 71.

[57] MASN Exh. 237 at 5 ¶ 17 (Gluck); Tr. 6055:16-20 (Gluck).

[58] Comcast Exh. 9 at 1-2 (email chain); Comcast Exh. 8 at 1-2 (email chain); Comcast Exh. 2 at 5 ¶ 14 (Ortman); Comcast Exh. 21 at 1-2 (memo from Mr. Cuddihy); Tr. 6882:14-6883:7 (Bond); Tr. 6454:18-22, 6455:5-9, 6595:21-6596:1, 6455:13-16 (Ortman); Tr. 6883:19-6884:9, 6885:9-6886:8 (Bond).

needs so that the parties could reach agreement.[59] MASN provided an updated proposal on August 2, 2006.[60]

29. On August 3, 2006, Comcast executives Messrs. Bond, Alan Dannenbaum, and Andrew Rosenberg participated in a telephone conference call with MASN's negotiating team, consisting of Messrs. Gluck, Wyche, and Alan M. Rifkin, to discuss the draft Settlement Agreement that MASN had forwarded to Mr. Bond.[61] During the meeting, MASN's representatives asked if Comcast would be willing to extend MASN's deadline to elect arbitration, and Comcast agreed.[62] Subsequently, however, a MASN representative indicated to Comcast that MASN preferred to continue discussions until the next morning before deciding whether to extend the deadline over the weekend.[63] Ultimately, MASN decided to press for an agreement by the close of business on Friday, August 4, 2006.[64]

30. The evidence demonstrates that, by the end of the day on August 3, 2006, the parties thought they had reached an agreement that would allow them to settle MASN's 2005 Carriage Complaint by launching MASN in systems serving approximately 2.2 million Comcast subscribers.[65] Thus, on August 4, 2006, at 1:30 p.m., Mr. Rosenberg sent MASN a revised draft of the Settlement Agreement with a cover email stating that the draft "reflects the deal we've been discussing over the past two days as well as some other clean-up changes."[66] Comcast

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[59] *See* Comcast Exh. 8 at 1 (email chain); Comcast Exh. 9 at 2 (email chain); Tr. 6883:19-6884:9, 6885:9-6886:8 (Bond); Tr. 6455:21 – 6458:1 (Ortman).

[60] MASN Exh. 237 at 5-6 ¶ 18 (Gluck); Comcast Exh. 1 at 5 ¶ 12 (Bond).

[61] Comcast Exh. 1 at 5 ¶ 12; Comcast Exh. 10 at 1 (email chain).

[62] Comcast Exh. 10 at 1 (email chain); Comcast Exh. 1 at 5 ¶ 12 (Bond).

[63] Comcast Exh. 10 at 1-2 (email chain).

[64] Tr. 6009:13-14 (Wyche); Tr. 6138:10-6140:8, 6092:12-6095:3 (Gluck).

[65] Comcast Exh. 1 at 5 ¶ 13 (Bond); Tr. 5994:9-13 (Wyche).

[66] Comcast Exh. 14 at 1 (email with attached draft); Comcast Exh. 14 at 2-15. MASN implies that the email transmitting Comcast's edits was misleading because it stated that it reflected "the deal we've been discussing." MASN RFC at 7 ¶ 169, 8 ¶ 171, 9-10 ¶ 174. The record demonstrates, however, that the parties did not discuss specific systems that would be included or excluded from the mandatory launch requirement. Tr. 5960:9-11 (Wyche) ("When I took a look at Schedule A, I wasn't doing a system-wide. I wasn't doing a system-by-system analysis."). Instead, the record establishes that the parties were discussing the number of Comcast subscribers that would receive MASN under the agreement. Comcast Exh. 1 at 5 ¶ 13 (Bond); Tr. 5960:11-16 (Wyche) ("What my responsibility was is to take a look at the total number of subscribers they were saying they were going to launch. They said they were going to launch; when I looked at this approximately 2.25 million subscribers."); Tr. 5977:21 – 5978:14, 5994:9-13 (Wyche) ("I saw the number in Schedule A. It reported 2.25 million. My estimate internally was 2.3 to 2.4 so it comported with my number, so I felt like we got the bargain we were talking about. It made sense to me."). The record also reflects that the 2.2 million Comcast

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modified MASN's earlier draft of the Settlement Agreement by: (1) eliminating the reference to launching MASN in "all" Comcast systems in MASN's territory; (2) including a new Schedule A listing the Comcast systems on which Comcast would launch MASN; and (3) inserting language giving Comcast the right, but not the obligation, to launch MASN on systems not listed in Schedule A.[67] These revisions were prominently displayed in "track changes" format so that MASN could readily identify the changes to the Settlement Agreement Comcast was proposing.[68] MASN admits that this revised draft did not include any references to "Adelphia" or "former Adelphia" systems.[69] MASN also admits that Schedule A does not include the systems in Harrisburg and southwest Virginia that are at issue in this Complaint.[70]

31. Slightly more than two hours after receiving Comcast's revised draft, Mr. Gluck replied to Comcast with some further changes, saying in an email that "we are nearly there."[71] Mr. Gluck made no mention of any carve-out for 150,000 former Adelphia subscribers nor did he suggest (i) restoring language committing Comcast to launch MASN on all systems or (ii) specifically describing the Comcast systems exempt from the MASN launch obligation. Mr. Gluck also did not raise any questions about which Comcast systems were not included in Schedule A and, therefore, were not required to launch MASN. After further revisions unrelated to the systems on which MASN would be carried,[72] both parties signed the Settlement Agreement at close to 5:00 p.m., and initialed every page, including each page of Schedule A.[73]

(footnote continued)
subscribers covered by Schedule A reflects the number of subscribers that MASN thought the parties had agreed upon. Tr. 5977:21 – 5978:14, 5994:9-13 (Wyche).

[67] Comcast Exh. 14 at 2 (redlined draft). Despite the introduction of the draft, redlined proposals regarding these matters, MASN claims Comcast provided no evidence to contradict Mr. Gluck's belief that the proposal would include all Comcast systems except for former Adelphia systems. The redlined changes clearly indicate that the launch obligation was limited to the systems set forth in Schedule A. Moreover, Mr. Gluck testified that he drafted the Settlement Agreement which included an integration clause barring reliance on oral understandings. Comcast Exh. 5 at 9; Tr. 6080:14-6081:11 (Gluck). Given this clause, it was incumbent upon MASN to request a list of systems excluded from the 2006 Settlement Agreement if that was an important issue for the company.

[68] Comcast Exh. 14 (email with attached redlined draft).

[69] Tr. 5949:14-15, 5950:1-5 (Wyche); Tr. 6083:9-16 (Gluck).

[70] Tr. 6029:17-6030:13 (Wyche); Tr. 6123:17-6124:19, 6125:5-6, 6134:12-15 (Gluck).

[71] Tr. 5949:14-15, 5950:1-5 (Wyche); 6083:9-16 (Gluck).

[72] The later revisions largely addressed the language of the Release. *See* Comcast Exh. 22 at 1 (email with redlined and clean drafts).

[73] Comcast Exh. 1 at 6-7 ¶ 17 (Bond); Comcast Exh. 5 (Agreement and Release). Because the parties signed both the Agreement and Release on August 4 in counterparts, they subsequently prepared final "clean" execution versions to be signed by both parties on Tuesday, August 8. Tr. 6132:2-6133:6 (Gluck); *see also* Comcast Exh. 23 at 1 (email chain).

32. These facts are largely uncontested. Nevertheless, at trial, the parties held differing views about the agreement they reached in August 2006. Despite the fact that Schedule A mandated carriage on numerous systems acquired from Adelphia[74] and does not include systems serving approximately [redacted] Comcast subscribers within MASN's territory,[75] Messrs. Gluck and Wyche testified that Comcast had agreed to carry MASN on all Comcast systems within MASN's territory except for certain "low-bandwidth/un-rebuilt" former Adelphia systems, covering approximately 150,000 Comcast subscribers.[76] Messrs. Gluck and Wyche further testified that this "Adelphia carve-out" was based on an *oral* understanding between Comcast and MASN that was not memorialized in the Settlement Agreement.[77]

33. MASN's witnesses fail to agree, however, on which Comcast negotiator made this alleged oral commitment to carry MASN to all systems within MASN's territory except those serving approximately 150,000 Comcast subscribers. Mr. Wyche testified that Mr. Bond made the alleged commitment,[78] but Mr. Gluck testified during his oral direct testimony that he "remember[s] . . . specifically" that Mr. Dannenbaum raised the need to exclude these unidentified former Adelphia systems.[79] Further, Mr. Ortman testified that there was a specific provision written into the Settlement Agreement that allowed Comcast to defer the launch of systems serving up to 150,000 subscribers. Mr. Ortman testified that this contractual provision was used to defer the launch of former Adelphia systems.[80]

34. Messrs. Gluck and Wyche further testified that they did not review the list of Comcast systems presented in the draft of Schedule A forwarded to MASN by Comcast's Mr.

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[74] Comcast Exh. 2 at 4 ¶ 10, 9-10 ¶ 22 (Ortman).

[75] MASN Exh. 71 at 1 (list of unlaunched systems).

[76] MASN Exh. 236 at 10 ¶ 35 (Wyche).

[77] Tr. 5949:5 – 5940:5 (Wyche); Tr. 6082:9 – 6083:16 (Gluck). MASN provided no contemporaneous, documentary evidence on this issue. This theory – central to its case – is based completely on the recollections of Messrs. Wyche and Gluck. MASN RFC at 8-10 ¶¶ 171-174. MASN cites a single email sent by Mr. Gluck as "contemporaneous" evidence, but it is nothing of the sort. MASN RFC at 6 n. 31 (citing Comcast Exh. 32). The email was sent more than five months after execution of the 2006 Settlement Agreement in response to inquiries regarding the Comcast systems not included in Schedule A. Rather than demonstrating Mr. Gluck's understandings during the 2006 negotiations, this email more likely reflects Mr. Gluck's attempts to preserve his reputation after a MASN advertising sales employee identified 15 systems that were not included in Schedule A by referencing a publicly available website – www.research.backchannelmedia. com. *See* Comcast Exh. 32.

[78] MASN Exh. 236 at 10 ¶ 35 (Wyche).

[79] Tr. 6058:5-19 (Gluck). MASN tries to explain away this conflicting testimony by claiming, for the first time, that Mr. Gluck was talking about different conversations at different times with different people. MASN RFC at 5-6 ¶¶ 165-67. The theory has no basis in the record.

[80] Tr. 6612:5-10 (Ortman).

Rosenberg on August 4, 2006.[81] MASN had the facts and experience necessary to confirm whether the list of systems in Comcast's draft Schedule A included all Comcast systems in MASN's territory, but did not do so. MASN attempts to explain this failure by alleging that, although Schedule A does not include systems serving approximately [redacted] Comcast subscribers, Comcast intentionally or fraudulently misled MASN into believing that Schedule A included all Comcast systems in MASN's territory, except for unidentified, former Adelphia systems serving up to 150,000 subscribers.

35. Comcast presented testimonial and documentary evidence demonstrating that it agreed to provide MASN with carriage on Comcast cable systems covering approximately 2.2 million Comcast subscribers in MASN's territory, excluding approximately [redacted] of Comcast's total subscribers (approximately 13 percent) in MASN's territory. Under this approach, Comcast would be obligated to launch MASN only on those systems enumerated on Schedule A to the Settlement Agreement, but would retain the discretion to launch on the other systems in the future.[83] Comcast also reserved the right to delay until April 1, 2008 launching MASN on a small number of systems listed in Schedule A that served up to 150,000 Comcast subscribers. These provisions were memorialized in the Settlement Agreement and were utilized to delay the launch of former Adelphia systems until capacity was available.[84]

36. MASN has failed to prove that Comcast misled it as to what was and was not included on Schedule A. Schedule A specifies the systems on which Comcast had an obligation to launch MASN, and the evidence provides no basis for interpreting Schedule A to mean anything other that what it says. It is undisputed that Schedule A does not include Comcast systems serving [redacted] subscribers within MASN's territory. It is also undisputed that Schedule A contained a written provision permitting Comcast to delay the launch of systems serving up to 150,000 subscribers, which Comcast exercised solely to deal with capacity issues in former Adelphia systems.[85] To avoid the application of these undisputed facts, MASN points to a second alleged Adelphia-related 150,000 subscriber carve-out based on alleged oral understandings. The notion that Comcast misled MASN into believing that there would be two

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[81] Tr. 6008:13-20 (Wyche) (testifying that he never looked at the individual systems on Schedule A); Tr. 6086:4-18, 6091:13-22 (Gluck).

[82] Comcast Exh. 1 at 5 ¶ 13 (Bond); Tr. 6903:14-17 (Bond); Tr. 7074:16-20 (Orszag); *see* Tr. 5902:18 – 5903:4 (Wyche).

[83] Comcast Exh. 1 at 5 ¶ 13 (Bond). MASN claims that "it is simply fanciful" to believe that Comcast would launch MASN on systems not included in Schedule A pursuant to the discretion clause of the 2006 Settlement Agreement. Again, the record belies MASN's claim. Comcast did launch MASN on a number of systems not listed on Schedule A. *See* Comcast Exh. 49 at 1 (email); Comcast Exh. 50 at 1 (email chain); Tr. 6942:3-6 (When asked, "So if you say no, the individual system cannot launch MASN, correct?," Mr. Bond responded under oath, "Yes, but in cases where they asked to launch we had said yes.").

[84] Comcast Exh. 5 at 12-13 (Schedule A); Tr. 6612:5-10 (Ortman).

[85] Tr. 6612: 5-10 (Ortman).

Adelphia-related 150,000 subscriber carve-outs – one in writing (delaying MASN's launch to certain former Adelphia subscribers) and one that is *not* in writing (excluding certain former Adelphia subscribers) – is simply not credible. Mr. Gluck specifically included a provision in the Settlement Agreement prohibiting reliance on oral understandings.[86] It defies common sense that MASN's knowledgeable and experienced businessmen, including the consultant that drafted the provision barring reliance on oral understandings, would be willing to rely on alleged oral agreements and representations from an opposing party. Moreover, the testimony of Messrs. Gluck and Wyche regarding the alleged oral representations was inconsistent and therefore lacks credibility.[87] At most, the testimony establishes that MASN may have been confused, not that Comcast misrepresented the scope of the Settlement Agreement in any way.[88]

37. Rather than misrepresentation or fraud by Comcast, the record at most demonstrates a general lack of due diligence by MASN that resulted in MASN's apparent misunderstanding.[89] MASN's only executive to testify admitted that, before entering into negotiations with a cable operator, "any RSN worth its salt" would find it essential to prepare a list of the operator's cable systems.[90] Nevertheless, the undisputed facts demonstrate that MASN

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[86] Comcast Exh. 5 at 9; Tr. 6080:14-6081:11 (Gluck).

[87] Messrs. Gluck and Wyche based their understanding of the carve-out on their recollections of statements by Comcast representatives and their beliefs about what was meant by what Comcast did *not* say, and their recollections differ in several respects. *See* MASN Exh. 236 at 10 ¶ 35 (Wyche); MASN Exh. 237 at 6 ¶ 20 (Gluck); Tr. 5937:22 – 5938:6, 5943:15-22 (Wyche); Tr. 6058:5-19, 6077:13-14, 6077:16-20 (Gluck).

[88] Tr. 6612:5-10 (Mr. Ortman testified, "There is in the agreement a provision carving out . . . potential[ly] up to 150,000 subscribers that were all Adelphia, former Adelphia, if we needed to delay that launch for up to a year. That's the 150,000 I am familiar with, and they were all former Adelphia systems.").

[89] For example, the record demonstrated that, after signing a carriage agreement with another MVPD, MASN discovered that a majority of the MVPD's subscribers were excluded from the agreement. Comcast Exh. 53 (email demonstrating MASN's surprise over the exclusion of subscribers from a carriage agreement). MASN attempts to downplay the significance of this email by stating that it was sent by "a MASN employee who was not involved in the negotiations." MASN RFC at 14-15 ¶ 187. The email, however, was sent by one of the top MASN executives – [redacted] – and Mr. Wyche testified that the systems excluded from the referenced carriage agreement were well known by MASN executives. Tr. 6015:8-12 (Wyche).

[90] Tr. 5635:8-5636:1 (Cuddihy). Mr. Cuddihy confirmed that this is MASN's practice when it enters into affiliation negotiations today. Tr. 5630:11-15 (Cuddihy). MASN claims that Mr. Cuddihy's policy was only adopted after the dispute with Comcast. MASN RFC at 11 ¶ 177. The record, however, demonstrates that Mr. Cuddihy was preparing such lists prior to the dispute and MASN's consultant, Mr. Gluck, testified that, based on his prior experience, other RSNs routinely kept such lists. Tr. 5649:6-5650:16, 5674:4-12 (Cuddihy); Comcast Exh. 91 at 1 (list of systems prepared by Mr. Cuddihy); *see* Tr. 6101:12-6103:19 (Gluck); *see also* Comcast Exh. 71 at 2 (email chain containing a system list sent by MASN to a cable operator for verification).

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did not compile such a list before entering negotiations with Comcast,[91] did not rely on readily-available lists,[92] and took virtually no steps to ensure that it knew what was being offered or to what it agreed.[93] This lack of due diligence could also be explained by the fact that MASN undisputedly understood it would be receiving – and was pleased to secure – guaranteed carriage to 2.2 million Comcast subscribers,[94] including but not limited to carriage in the core

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(footnote continued)
Thus, contrary to MASN's claim, the record demonstrates that the standard industry practice is for an RSN to bring a list of systems within the RSN's footprint to the MVPD for verification as part of negotiations– something MASN did not do here. *See* MASN RFC at 10 ¶ 175.

[91] Tr. 5968:18-5969:4 (Wyche) (testifying in response to a question asking whether MASN had a list of Comcast's systems prior to entering negotiations — "Not that I'm aware of"); 6103:22-6104:1 (Gluck) (testifying that he did not have a list of Comcast systems). MASN actually had a list previously prepared by Mr. Cuddihy, but never shared this list with its negotiators. Tr. 5649:6-5650:16, 5674:4-12 (Cuddihy). MASN claims that this list produced by Mr. Cuddihy demonstrates the difficulty of compiling a list of a cable operator's systems from public sources because it did not contain all of the Comcast systems in Schedule A. MASN RFC at 12 ¶ 179. This claim is unavailing because the lists were compiled years apart. Tr. 5639:3-5640:4, 5649:6-5650:6, 5672:19-5673:3 (Cuddihy); Comcast Exh. 91 (system list). Comcast acquired numerous additional systems during that period as part of the Adelphia transaction, and may have acquired additional systems as well.

[92] Tr. 5649:6-5650:16, 5674:4-12 (Cuddihy); Comcast Exh. 91 at 1; Tr. 5991:7-11 (Wyche) (referencing a Nielsen list in his possession that contained a list of systems).

[93] The record established that many programmers use a particular Nielsen report containing a list of systems as a starting point in carriage negotiations with MVPDs. Tr. 6472:3-15 (Ortman). When MASN obtained this list after signing the Settlement Agreement, it was able to work out any discrepancies with Mr. Ortman and verify the system list "in a few minutes." Tr. 6472:6-6473:8 (Ortman). Indeed, if MASN had merely reviewed the names of the systems listed on Schedule A and the corresponding subscriber numbers, it would have been readily apparent that Harrisburg was not included. None of the Pennsylvania systems listed on Schedule A had subscriber numbers that could have included Harrisburg.

[94] Tr. 5960:9-14, 5960:20-5961:2, 5978:4-6 (Wyche) (testifying that the extent of his review of Schedule A was "to take a look at the total number of subscribers they were saying they were going to launch"; that "it looked to us [MASN's negotiators] and we believed that we were getting what we bargained for"; and that he understood Comcast's contractual launch commitment to be 2.2 million subscribers); Tr. 6086:9-6087:2, 6090:18-21 (Gluck) (testifying that, shortly after MASN's negotiators understood Comcast's offer to include 2.2 million subscribers, he notified Comcast that MASN was "nearly there," except for "some clean-up changes," and that the breadth of Comcast's launch commitment and the 2.2 million subscriber figure in Schedule A "gave me the level of comfort that I needed"); Tr. 6703:14-19 (Ortman) (testifying to his understanding that MASN was "very happy" with having received a rapid launch commitment of 2.2 million subscribers).

Washington and Baltimore markets.[95] This explanation is particularly plausible in light of MASN's prior representations to the Commission that carriage in the core markets in MASN's territory was MASN's preeminent concern, and that carriage in the fringe markets was not a priority.[96]

38. Comcast's witness testimony and other evidence, by contrast, were credible and probative. Comcast's evidence is entirely consistent with the express language of the Settlement Agreement and Release and does not turn on unlikely allegations of oral agreements, misrepresentation, or fraud. The Presiding Judge finds implausible that respected businessmen such as Messrs. Bond, Dannenbaum and Rosenberg would risk their reputations by fraudulently precluding MASN from accessing a mere 13 percent of Comcast's subscribers in MASN's territory. Indeed, if MASN is correct that it expected that former Adelphia systems would be excluded from the launch obligation, then the only market of any significance remaining unlaunched would be Harrisburg. There is no apparent motive why Comcast would seek to exclude that one system for some anti-competitive purpose, let alone do so secretly.

Discussions Regarding the Unlaunched Systems

39. The evidence indicates that, after the parties entered into the Settlement Agreement, the issue of "unlaunched systems" was not revisited by the key negotiators for both parties until early 2007. Specifically, in April 2007, representatives of MASN and Comcast met to discuss MASN's desire to provide different advertising in different markets.[97] At that meeting, MASN representatives indicated concern that Comcast was not carrying MASN programming on the Harrisburg and the former Adelphia Blue Ridge systems (mostly in Roanoke-Lynchburg and other DMAs in Virginia).[98] It is undisputed that the parties were discussing whether Schedule A of the Settlement Agreement obligated Comcast to launch MASN in Harrisburg, Pennsylvania. MASN argued that any omission of Harrisburg from Schedule A was an error and that Comcast had a contractual obligation to launch MASN in Harrisburg.[99] Comcast responded that Harrisburg was not listed on Schedule A and thus, under the terms of the Settlement Agreement, Comcast was not obligated to carry MASN there.[100]

40. Comcast has provided substantial evidence regarding numerous exchanges with MASN during 2007 and 2008 to follow up on the matter of the unlaunched systems. Comcast's

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[95] Comcast Exh. 5 at 12-13 (Agreement and Release).

[96] Comcast Exh. 82 at 3 (MASN letter), 14 (Singer declaration) (stating that "territories as far away as rural Pennsylvania" from the "core" Washington and Baltimore DMAs are "largely irrelevant . . . because of the diminished interest of consumers there in the Orioles and Nationals.").

[97] Comcast Exh. 1 at 7-8 ¶ 18 (Bond).

[98] *Id.*

[99] *Id.*

[100] *Id.*

evidence indicates that these exchanges all centered around whether the Settlement Agreement obligated Comcast to "carry MASN on all systems within the MASN territory" or only in the systems listed on Schedule A.[101] The record demonstrates that Comcast exercised its discretion not to carry MASN in the disputed systems based on the 2006 Settlement Agreement and feedback from the individual systems.[102]

41. At trial, MASN's witnesses evinced their understanding that MASN's exchanges with Comcast during 2007 and 2008 were focused on attempting to resolve the parties' differences over where the Settlement Agreement imposed carriage obligations on the unlaunched systems, not on any new request for carriage under the discretion clause in the 2006 Settlement Agreement.[103] At no point did MASN attempt to persuade or demonstrate to Comcast – either at the system or corporate level – that carriage was warranted pursuant to the discretion clause based on subscriber demand for MASN's programming. Rather, MASN took the position that a mistake had been made in memorializing the parties' understandings in 2006 and that Comcast was obligated to launch MASN on the unlaunched systems pursuant to the

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[101] *Id.* at 9-10 ¶¶ 21-28.

[102] *Id.* at 7-8 ¶ 18; Tr. 6734:10-19, 6916:15-17 (Bond); *see* Comcast Exh. 59; Comcast Exh. 60 at 1; Comcast Exh. 63; Comcast Exh. 64; Comcast Exh. 65; Comcast Exh. 58 at 1; *see also* Comcast Exh. 2 at 13 ¶ 29 (Ortman); Comcast Exh. 12.

[103] Tr. 6029:17-6030:13 (Wyche) (stating that "Our position was that we believed that the bargain that we had was that they were to launch us on all of their systems except the Adelphia one, 150,000. . . . [The meetings] were about the missing markets in the contract."); Tr. 6123:17-6124:19, 6125:5-6, 6134:12-15 (Gluck) (stating that "Comcast is required to launch MASN in Harrisburg, Roanoke/Lynchburg and Tri-Cities under the 2006 agreement" and that "the list of systems" — Schedule A — "is incorrect. They left those names off. . . . I think what happened, what we got, was an incomplete exhibit and so I guess we signed an agreement that wasn't correct."). MASN cites to one passage from Mr. Gluck's testimony as evidence that this case is not about the 2006 Settlement Agreement. MASN RFC at 55 n. 245 (citing Mr. Gluck's testimony that this is "not now" a contract dispute). The weight of the evidence is to the contrary. Tr. 6029:17-6030:13 (Wyche); Tr. 6123:17-6124:19 (Gluck); Tr. 6125:5-6, 6134:12-15 (Gluck); Comcast Exh. 1 at 7-8 ¶ 18 (Bond); Tr. 6734:10-19, 6916:15-17 (Bond); *see* Comcast Exh. 59; Comcast Exh. 60 at 1; Comcast Exh. 63; Comcast Exh. 64; Comcast Exh. 65; Comcast Exh. 58 at 1; *see also* Comcast Exh. 2 at 13 ¶ 29 (Ortman); Comcast Exh. 12. If this case was not about the 2006 Settlement Agreement, MASN would not likely devote the bulk of its case to the negotiations of that agreement and the conduct of Comcast officials prior to execution of that agreement. In this regard, MASN dedicated more than 70 pages to proposed findings of fact; less than one page dealt with the post-2006 Settlement Agreement period. Further, despite MASN's characterization, Mr. Gluck's testimony was that the dispute was about the contract in 2007 but is "not now" (*i.e.*, before the Commission in 2009) about the Settlement Agreement. Tr. 6135:13-19 (Gluck) ("Q: But this is a contract dispute, correct? A: No, not now. We went back to them in January of whatever, I guess 2007 and said, 'We want you to launch us in these systems that you didn't launch us in. *You were obligated to*.'") (emphasis added).

Settlement Agreement.[104] When Comcast asserted, based on its own reasonable understanding, that no mistake had been made and that carriage was not mandated by the Settlement Agreement, MASN's counsel responded that it was "evident that Comcast and MASN have very different views of the facts surrounding the formation of the August 4, 2006 agreement."[105]

ANALYSIS AND CONCLUSIONS OF LAW

Statute of Limitations and *Res Judicata*

42. As a preliminary matter, the Presiding Judge will address in this Recommended Decision Comcast's arguments that MASN's program carriage complaint was time-barred by the applicable statute of limitations and barred by the doctrine of *res judicata.*[106] Comcast originally raised these arguments before the Media Bureau, which considered and rejected the arguments in the *HDO*.[107] The Presiding Judge has already concluded that the facts and conclusions recited by the Media Bureau in the *HDO* will not be considered as binding.[108] In addition, the Commission has made clear that the Presiding Judge is not bound by a hearing designation order where, as here, "new facts or circumstances" are presented in the hearing.[109] Moreover, the *HDO* is a Bureau-level order and not binding on the full Commission.[110] Thus, under these circumstances and given that the Presiding Judge is presenting this Recommended Decision to the full Commission, which is not constrained by the *HDO*, the Presiding Judge is not constrained by the Media Bureau's legal conclusions on these matters.

43. The evidence adduced at trial demonstrates conclusively that the instant program carriage dispute was time-barred by the statute of limitations. The Commission's rules specify that a program carriage complaint concerning a carriage agreement must be filed within one year of entering into the agreement.[111] The parties executed the Agreement on August 4, 2006, and

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[104] Tr. 6029:17-6030:13 (Wyche); Tr. 6123:17-6124:19, 6125:5-6, 6134:12-15 (Gluck); Comcast Exh. 1 at 7-8 ¶ 18 (Bond).

[105] Comcast Exh. 19 (Frederick letter); Comcast Exh. 1 at 9-10 ¶ 27 (Bond). *See generally* Comcast PFC at 40-44 ¶¶ 82-88.

[106] *See* Comcast PFC at 62-69 ¶¶ 124-135.

[107] *HDO,* 23 FCC Rcd at 14834-35 ¶ 105.

[108] *November 20 MO&O,* FCC 08M-47, at 6-7 ¶ 6 ("[A] recommended decision will be made on the specified issues based *solely* on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*.") (emphasis in original); Tr. 97:17-22 (Nov. 25, 2008) (Sippel, C.J.) ("I'm citing to Judge Steinberg now, but . . . for me, that's the rule of the case, unless I'm directed to do otherwise by a higher authority. And it's a *de novo* case. That's the difference between no hearing and a hearing.").

[109] *Atlantic Broadcasting Co*., 5 FCC 2d 717, 720 (1966).

[110] *Greater Media Radio Co.,* 15 FCC Rcd 7090, 7095 n.13 (1999) (overruling Bureau precedent).

[111] 47 C.F.R. § 76.1302(f)(1).

therefore MASN had to file any challenge to the Agreement no later than August 4, 2007. MASN filed the instant complaint with the Commission on July 1, 2008, nearly eleven months too late.

44. In an attempt to avoid this problem, MASN has taken the position that the instant complaint is based exclusively on Comcast's conduct during 2007 and 2008 and does not relate to the Settlement Agreement.[112] But the overwhelming majority of MASN's proposed findings of fact and proposed reply findings of fact relate to the parties' negotiations in July and August of 2006 and the intended meaning of the Agreement.[113] Only two paragraphs of MASN's proposed findings of fact and one paragraph of its proposed reply findings of fact relate to alleged refusals by Comcast to carry MASN in 2007 or 2008.[114] MASN does not identify when, where, or in what manner it requested carriage during that time, other than that "[t]here was a meeting in April," nor does it cite evidence regarding when, where, or in what manner Comcast refused those requests, other than that Comcast said it was not required to carry MASN in the unlaunched systems under the Agreement.[115] Under these circumstances, it is clear that the gravamen of MASN's Complaint relates exclusively to the negotiation and application of the Agreement. To treat the Complaint differently because it was in the form of a complaint about discrimination on the basis of affiliation rather than a complaint about a carriage agreement "would 'elevate form over substance and allow parties to evade'" the statute of limitations "simply by 'relabeling their contract claims.'"[116]

45. MASN provided no evidence demonstrating that the parties' discussions regarding carriage in 2007 and 2008 related to anything other than the scope of Comcast's carriage obligations under the Settlement Agreement. It never alleged that it (i) sought carriage on unlaunched systems by encouraging the systems to launch pursuant to the discretionary carriage provision of the Settlement Agreement or (ii) attempted to prove to those systems that carriage of MASN was justified based on demand.[117] In fact, MASN's witnesses,[118] as well as

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[112] *HDO,* 23 FCC Rcd at 14834-35 ¶ 105.

[113] *See* MASN PFC at 6 ¶ 19, 7-11 ¶¶ 23-33, 12-17 ¶¶ 35-45, 17-39 ¶¶ 47-90, 41-43 ¶¶ 94-97, 43-44 ¶ 99, 45-46 ¶¶ 102-103, 49-50 ¶¶ 108-110, 53-54 ¶¶ 116-118, 60-62 ¶¶ 130-132; MASN RFC at 2-4 ¶¶ 154-159, 5-13 ¶¶ 163-183, 15-17 ¶¶ 190-191, 17 ¶ 193, 18 ¶ 195, 18-21 ¶¶ 197-202, 22-24 ¶¶ 206-208.

[114] *See* MASN PFC at 40 ¶¶ 92-93; MASN RFC at 60-61 ¶ 163.

[115] *See* MASN PFC at 40 ¶ 92 & nn. 225-226.

[116] *Aetna Health, Inc. v. Davila,* 542 U.S. 200, 214 (2004).

[117] MASN suggests this would have been futile because Mr. Bond testified that he would ultimately have to approve carriage of MASN on any systems not listed on Schedule A , and he had already determined that carriage on the unlaunched systems was unnecessary. MASN RFC at 17 ¶ 192. However, MASN omitted the fact that Mr. Bond also qualified the need for his approval by stating that "in cases where [systems not listed on Schedule A] asked to launch we had said yes." Tr. 6942:3-6 (Bond). MASN also ignored the fact that Comcast had, in fact, added MASN to systems that were not listed on Schedule A. *See* Comcast PFC at 39-40 ¶ 79.

its counsel,[119] admitted that the discussions in 2007 and 2008 related to the parties' differences over whether Comcast was required by the Settlement Agreement to carry MASN on the unlaunched systems. While MASN claims that it is not invoking any rights under the Settlement Agreement here, it is beyond doubt that MASN is claiming that Comcast's denial of carriage in 2007 and 2008 was based on an interpretation of the Settlement Agreement with which MASN disagrees. Thus, MASN is necessarily challenging Comcast's interpretation of the Agreement. Under the relevant statute of limitations,[120] any complaint directed at the scope of the 2006 Settlement Agreement had to be filed within one year of August 4, 2006. MASN's complaint was filed eleven months after the August 4, 2007 deadline.

46. MASN cannot evade the statute of limitations by couching its complaint about the Agreement as a discrimination complaint based on the unsatisfactory outcome of new negotiations in 2007-2008.[121] Even if the record supported the existence of such new negotiations rather than a dispute about the 2006 Settlement Agreement, which it does not, the Commission has long held that "subsequent negotiations do not reopen an existing contract to program access, program carriage, or open video system complaints after one year has elapsed from the execution of the contract."[122] Thus, for a complaint to avoid being time-barred one year after a contract's execution, it "must be unrelated to any existing contract," and "an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory."[123] Given that

(footnote continued)

[118] *See* para. 41 *supra*.

[119] Comcast Exh. 19 (letter from MASN counsel stating that "Comcast and MASN have very different views of the facts surrounding the formation of the August 4, 2006 agreement," and that "MASN has engaged in negotiations with Comcast in an effort to reach a mutual resolution of this important matter.").

[120] 47 C.F.R. § 76.1302(f)(1).

[121] For this reason, MASN's suggestion that it can avoid the requirements of Section 76.1302(f)(1) by relying on Section 76.1302(f)(3), which permits the filing of a program carriage complaint within one year of notification to an MVPD of the complainant's intent to file a complaint, is also unavailing. The Commission has made clear that Section 76.1302(f)(3) applies only where the defendant "unreasonably refuses to negotiate with the complainant," a situation not at issue here. *1998 Biennial Regulatory Review — Part 76 — Cable Television Service Pleading and Complaint Rules,* CS Docket No. 98-54, *Order on Reconsideration,* 14 FCC Rcd 16433, 16435 ¶ 5 (1999) ("*Part 76 Reconsideration Order*"), *aff'g id., Report and Order,* 14 FCC Rcd 418, 424 ¶ 18 (1998) ("*Part 76 Report and Order*"). Moreover, to permit subsection (f)(3) to serve as a catch-all that overrides the more specific subsection (f)(1) regarding contracts would render the former statute of limitations provision superfluous, contrary to fundamental principles of legal interpretation.

[122] *Part 76 Reconsideration Order*, 14 FCC Rcd at 16438 ¶ 10.

[123] *Part 76 Report and Order*, 14 FCC Rcd at 424 ¶ 18; *see Echostar Communications Corp. v. Fox/Liberty Networks LLC,* 14 FCC Rcd 10480, 10483 ¶ 7, 10486 ¶ 14 (CSB 1999) ("By adopting a limitations period for program access complaints, the Commission inherently

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MASN is charging Comcast with discrimination for relying on a contractual list of systems where carriage is obligatory, and claiming that it was misled into signing the 2006 Settlement Agreement incorporating that list, MASN's Complaint must be dismissed with prejudice as untimely because, contrary to Section 76.1302(f)(1) of the Rules, MASN did not file it within a year of the execution of the Settlement Agreement.[124]

47. With respect to *res judicata*, MASN's focus on the pre-2007 period may not have been readily apparent from the paper filings before the Media Bureau when it declined to reject MASN's complaint on *res judicata* grounds,[125] especially because MASN's Reply specifically stated that MASN was only challenging Comcast's actions starting in January 2007.[126] The case presented by MASN during the hearing, including facts and theories never previously presented to the Media Bureau, now compel a finding that MASN's Complaint is barred by *res judicata*. It is apparent from the record that MASN's Complaint is a challenge to its 2006 Settlement Agreement with Comcast. The Settlement Agreement constituted a final resolution of MASN's claims regarding whether Comcast's refusal to carry MASN on *all* Comcast systems throughout MASN's territory, including Harrisburg and southwestern Virginia, constituted unlawful

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(footnote continued)
recognized that, following a reasonable time in which to raise allegations of discrimination or unfair practices, the parties to a programming agreement must operate under the terms thereof or negotiate amendments thereto free of the program access specter"), *denying pet. for recon. of Echostar Communications Corp. v. Fox/Liberty Networks LLC,* 13 FCC Rcd 21841, 21949 ¶ 20 (CSB 1998) ("We believe that public policy requires that we avoid unnecessary regulatory interference regarding contracts entered into by consenting parties. . . . After [the one-year limitations period] has elapsed, the parties may renegotiate the terms of such contracts, but doing so will not subject such contracts once again to program access review unless they enter into a new contract."). The Commission endorsed this decision with respect to the program carriage statute of limitations as well as the program access statute of limitations, which it treated as being the same for this purpose. *Part 76 Report and Order*, 14 FCC Rcd at 424 ¶ 18 & n.40.

[124] Of course given that MASN claims to have "discovered" what Schedule A in fact provided in early 2007, it could have easily filed this complaint within a year of August 2006 and thus within the requisite one-year statute of limitations. In addition, enforcing the statute of limitations here is consistent with the policy underlying the rule – adjudicating disputes while the facts are fresh. In this regard, and not surprisingly given the passage of time, virtually every witness testifying about the period leading up to the execution of the Agreement suffered some lapses of memory. *See* para. 33 *supra*; MASN Exh. 237 at 6 ¶ 21 (describing a telephone conversation with Andrew Rosenberg "and/or" Alan Dannenbaum); Tr. at 5792:9-11 (Cuddihy) ("Judge, if I could recall, I would tell you. I just don't remember. This was January 2006. . . ."); Tr. 5893:1-3 (Wyche); Tr. 6002:15 - 6007:15 (Wyche); Tr. 6013:5-22 (Wyche) (responding "I don't remember" to a variety of questions); Tr. 6132:20-22 (Gluck); Tr. 6889:10-13 (Bond) ("it's been a long time so I don't remember specifically what she sent me back on Monday, July 31st, of '06"); Tr. 6894:11-13 (Bond) ("with this passage of time I really just don't remember it").

[125] *HDO,* 23 FCC Rcd at 14834-35 ¶ 105.

[126] *See* MASN Exh. 219 at 35, 55-59.

discrimination on the basis of affiliation.[127] MASN accepted carriage on the systems listed in Schedule A to the Settlement Agreement – carriage elsewhere was expressly left to Comcast's discretion – as a complete settlement of its claim to an entitlement to carriage on all Comcast systems in MASN's territory. MASN entered into the Settlement Agreement as a legally binding document that governed where and when it would be carried on Comcast systems for a decade and that extinguished its carriage claims against Comcast. As required by the Settlement Agreement and Release, MASN sought and obtained from the Commission dismissal of its then-pending complaint. Accordingly, reopening the issues finally resolved by the Settlement Agreement is barred by *res judicata.*[128]

48. It is clear from the parties' testimonial and documentary evidence that MASN's claim in this case is wholly encompassed by the claim it settled in 2006, *i.e.,* whether Comcast's decision not to carry MASN on all of its systems in MASN's territory is unlawfully discriminatory. In other words, MASN is attempting to reopen the Settlement Agreement in order to secure a better deal that it agreed to in 2006. As such, the instant Complaint was improperly filed and should be dismissed. Indeed, the Commission has strong policy reasons to bar MASN from using the carriage complaint process in this matter, namely that "fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end."[129]

49. The Presiding Judge therefore finds that the instant program carriage complaint is barred by the statute of limitations and the doctrine of *res judicata.* Having reached this conclusion, the Presiding Judge need not address the additional questions of whether Comcast's conduct constituted discrimination on the basis of affiliation or non-affiliation or whether any such discrimination unreasonably restrained MASN's ability to compete fairly. Nevertheless, the Presiding Judge will address these issues so as to provide a more complete analysis of the case to the Commission, consistent with the Commission's view that it would be necessary to "identify specific behavior that constitutes 'discrimination' as [the Commission] resolve[s] particular Section 616 complaints, because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation."[130]

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[127] Comcast Exh. 5 (Settlement Agreement).

[128] *See*, *e.g.*, 9 Wright & Miller: FEDERAL PRAC. & PROC. § 2367 ("Under the [Federal Rules of Civil Procedure Rule 41(a)] . . . dismissal [with prejudice] constitutes an adjudication on the merits which bars a later suit on the same claim by the plaintiff.").

[129] *COMSAT Corp. v. IDB Mobile Communications, Inc.*, 15 FCC Rcd. 7906, 7911 ¶ 13 (2000), *aff'd,* 15 FCC Rcd 14697 (2000).

[130] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket 92-265, *Second Report and Order*, 9 FCC Rcd 2642, ¶ 14 (1993) ("*Program Carriage Order*").

Burden of Proof

50. Consistent with the Administrative Procedure Act,[131] MASN has "the burden of proceeding with the introduction of evidence and the burden of proof."[132] MASN must carry the burden of persuasion on each fact necessary to its case.[133] Given that MASN is the party with the burden of persuasion, if the evidence on any given point is evenly balanced, MASN "must lose."[134] The Supreme Court confirmed just a few weeks ago that, in the absence of anything in the statute to the contrary, the plaintiff bears the burden of persuasion in discrimination — and all other — cases.[135]

51. MASN has argued that discrimination cases arising under Section 76.1301(c) of the Commission's rules must be governed by a "burden-shifting" framework in which a complainant bears only the burden to establish a *prima facie* case of unlawful discrimination on the basis of affiliation or non-affiliation. Under MASN's theory, where a complainant is successful in establishing such a *prima facie* case, the burden shifts to the defendant to persuade the Presiding Judge that its actions were non-discriminatory and in good faith.

52. The Presiding Judge has already ruled that the burden of persuasion in this case rests with MASN.[136] There is no need for the Presiding Judge to revisit that issue here, because, under any standard, the record evidence proves conclusively that Comcast did not discriminate on the basis of affiliation, at all times acted in good faith and in accordance with legitimate

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[131] 5 U.S.C. § 556(d) provides, in relevant part, "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

[132] *October 23 Order,* FCC 08M-44, at 2 (emphasis added); *see November 20 MO&O,* FCC 08M-47 at ¶ 6.

[133] *Concrete Pipe & Products v. Construction Laborers Pension Trust,* 508 U.S. 602, 622 (1993) ("The burden of showing something by a preponderance of evidence . . . requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.") (internal quotation marks omitted).

[134] *Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 137 n.9 (1997) (*quoting Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries,* 512 U.S. 267, 281 (1994)).

[135] *Gross v. FBL Financial Services, Inc.,* No. 08-441 slip op. at 9 (U.S. June 18, 2009). As recently as June 29, 2009, the Commission, citing Supreme Court case law, reiterated that the premise that the burden of persuasion rests with the complainant "has historically been the case in American jurisprudence." *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as amended*, WC Docket No. 07-267, *Report and Order*, FCC 09-56, ¶ 20 (rel. June 29, 2009).

[136] *October 23 Order,* FCC 08M-44, at 2 (emphasis added); *see November 20 MO&O,* FCC 08M-47, at ¶ 6 (the facts must be assessed *de novo* in hearing); Tr. 79:17-22 (Judge Sippel finding that Judge Steinberg's rulings are the law of the case).

business objectives, and did not unreasonably restrain MASN from competing fairly in the marketplace.

53. The Presiding Judge's decision not to adopt MASN's proposed "burden-shifting" framework is further guided by the legislative history of Section 616 of the Communications Act of 1934, as amended. Section 616 directed the Commission to establish rules prohibiting "discriminat[ion] . . . on the basis of affiliation or nonaffiliation."[137] The Commission therefore adopted Section 76.1301(c) echoing the language of Section 616.[138] In establishing this non-discrimination requirement, both Congress and the Commission recognized that the public interest would not be served by an overly broad application of program carriage regulation that failed to "preserve[] the ability of the affected parties to engage in legitimate, aggressive negotiations" or "preclud[e] legitimate business practices common to a competitive marketplace."[139] To that end, Congress expressly admonished the Commission to "rely on the marketplace to the maximum extent feasible."[140]

54. In light of these clear Congressional directives, the Presiding Judge must construe Section 76.1301(c) of the Commission's rules narrowly, giving full weight to the limitations established by the codified language "on the basis of affiliation or non-affiliation." Adopting MASN's "burden-shifting" framework would effectively read this language out of the statute and the rules. Under MASN's approach, a complainant would not have to prove discrimination on the basis of affiliation or non-affiliation, but rather the defendant would have to prove the negative, *i.e.* that its actions were *not* on the basis of affiliation or non-affiliation. This would mean that a cable operator could be found in violation of the program carriage rules without any evidence of discrimination on the basis of affiliation, something not intended by the rules.

55. In order to prevail, MASN must prove that Comcast discriminated against it in the selection, terms, or conditions of carriage "on the basis of affiliation or non-affiliation" and that such discrimination had the effect of unreasonably restraining MASN's ability to compete fairly.[141] MASN must also prove that any legitimate reasons offered by Comcast for its carriage

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[137] 47 U.S.C. § 536(a)(3).

[138] 47 C.F.R. § 76.1301(c) ("No [MVPD] shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.").

[139] *Program Carriage Order*, 9 FCC Rcd at 2643, 2648-49 ¶¶ 1, 14, 15; *see also In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, *Memorandum Opinion and Order*, 9 FCC Rcd 4415, 4419 ¶ 27 (1994).

[140] 1992 Cable Act § 2(b)(2).

[141] 47 U.S.C. § 536(a)(3) (2009); 47 C.F.R. § 76.1301(c) (2009). The Commission has acknowledged that Congress intended that discrimination allegations in program carriage complaints be evaluated "with respect to the extensive body of law addressing discrimination in

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decisions related to MASN's programming network were so implausible that they are nothing more than a pretext for discrimination.[142] The Presiding Judge concludes that MASN failed to meet its burden.

Discrimination on the Basis of Affiliation or Non-Affiliation

56. Upon weighing the facts and the law, the Presiding Judge concludes that MASN has failed to prove discrimination on the basis of affiliation or non-affiliation in violation of Section 76.1301(c) of the Commission's Rules. As noted above, MASN has argued that its claims relate entirely to Comcast's conduct during 2007 and 2008, after the Settlement Agreement had been executed. This assertion is a thinly veiled effort to avoid the consequences of the statute of limitations. In any event, even if the dispute was about Comcast's conduct during 2007 and 2008, the Complaint necessarily fails because MASN has produced no evidence whatsoever demonstrating unlawful discrimination by Comcast during that period. Although this alone provides an adequate basis for denying MASN's complaint for lack of proof, for completeness, other allegations are addressed below.

57. MASN relies exclusively on pre-2007 evidence purportedly showing that Comcast treated MASN differently than its own affiliated and similarly situated RSNs. MASN justifies this approach on the grounds that "past acts of discriminatory conduct can evidence present discriminatory intent."[143] Nevertheless, MASN's evidence is wholly insufficient to support an inference of unlawful discrimination against Comcast. Taken individually, or together, MASN's evidence fails to prove Comcast violated Section 76.1301(c) of the Commission's regulations during 2007 and 2008 (or ever for that matter).

58. As a threshold matter, MASN has not proven that it is similarly situated to Comcast's RSNs.[144] *MASN* is the party with the burden of proving that it is similarly situated to Comcast's affiliates, yet it simply assumes that, because it is an RSN and Comcast's affiliates, CSN-MA and CSN-P, are also RSNs, they are similarly situated. MASN provides no proposed facts to support this conclusion.[145] Instead, MASN relies on the Media Bureau's assertion in the

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normal business practices." *Program Carriage Order,* 9 FCC Rcd at 2645 n.6, *citing* H.R. Rep. No. 102-628, at 110 (1992) (House Report on the 1992 Cable Act).

[142] *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 804 (1973).

[143] MASN PFC at 89 ¶ 42.

[144] *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1977) (in an action alleging unlawful discrimination, "there is a threshold question whether the companies are indeed similarly situated"). MASN admits that it must establish that it is similarly situated to Comcast's affiliated RSNs. MASN PFC at 85 ¶ 27.

[145] *See* MASN PFC at 1-72 ¶¶ 1-152.

HDO that Comcast did not dispute in its Answer that its affiliated networks are similarly situated to MASN[146] — an assertion that is incorrect on its face.[147]

59. MASN's reliance on the *HDO* – after the Presiding Judge determined that the case was an empty box[148] – does not constitute evidence and cannot meet MASN's burden to prove differential treatment of similarly situated networks. Moreover, MASN is completely ignoring the fact that the RSNs in question have longer histories of carriage, carry different teams and different sports, and that there are different levels of fan interest in these sports and teams in different locations.[149] Such differences could readily support a conclusion that two RSNs are not similarly situated, but MASN fails to even attempt to prove that MASN is similarly situated to CSN-MA, much less CSN-P. This lack of evidence alone is fatal to MASN's complaint – there can be no discrimination where an MVPD treats dissimilar programming networks dissimilarly.

60. Further, MASN's allegations that Comcast's negotiating position with regard to the Settlement Agreement was a plan to protect Comcast's affiliated RSNs "concocted at the top levels of the company" and orchestrated by Mr. Cohen are unsupported by the evidence.[150] The weight of the credible evidence demonstrates that Comcast negotiated the Settlement Agreement and Schedule A in good faith. As noted, the Commission established that the program carriage rules were designed to "preserve[] the ability of affected parties to engage in legitimate, aggressive negotiations."[151] Comcast's negotiations with MASN readily meet this standard. Indeed, the evidence reveals that Comcast sincerely wished to settle its dispute with MASN and worked diligently to develop a proposal that would be a substantial "win" for MASN, while limiting Comcast's obligations and costs associated with carriage of MASN in areas of low demand. The internal Comcast emails that MASN cites to do not support the theory that MASN weaves. The emails do not evince any discriminatory intent on Comcast's part, nor do they even mention Harrisburg, Roanoke/Lynchburg, or Tri-Cities as part of the alleged conspiracy. The

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[146] *Id.* at 86 ¶ 29, *citing HDO,* 23 FCC Rcd at 14835-36 ¶ 108.

[147] The *HDO* cited some of the paragraphs from Comcast's Answer in which Comcast specifically denied the allegations that its affiliated networks are similarly situated to MASN but then inexplicably stated Comcast "has not attempted to demonstrate" that they are not similarly situated. *See* Answer at 47 ¶¶ 64-65, 50 ¶ 92 (Comcast Exh. 88 at 50, 53) (official notice exhibit); *HDO,* 23 FCC Rcd at 14836 ¶ 108 & n.479.

[148] Tr. at 48: 12-20 (Judge Steinberg) (stating that "the hearing record is a box and when we start the hearing the box is empty and then we close the record and whatever is in the box is what I base my decision on. . . . The HDO in the box is only for the purpose of showing that there was an HDO issued."); Tr. 97:16-21 (Judge Sippel) (stating that Judge Steinberg's rulings are "rule of the case" and that this is "a de novo case"); Tr. 107:1-6 (Judge Sippel) (noting that there is no prima facie case unless he determines that such a showing has been made).

[149] Comcast Exh. 3 at 3-9 ¶¶ 8-27 (Gerbrandt); Comcast Exh. 4 at 27-28 ¶ 49 (Orszag).

[150] *Compare* MASN PFC at 19-24 *with* Comcast RFC at 19-23.

[151] *Program Carriage Order*, 9 FCC Rcd at 2648-49 ¶ 14.

existence of the referenced emails is unsurprising given that the Settlement Agreement was intended to resolve MASN's litigation involving both Comcast's Programming Group and its Cable Group.[152]

61. MASN's allegations that Comcast misled it in the formation of the Settlement Agreement and in the preparation of Schedule A are unsupported by the evidence and are not credible.[153] Comcast prominently deleted language that would have required Comcast to carry MASN on "all" systems in the August 4, 2006 draft agreement and replaced that language with a specific list of systems required to carry MASN in Schedule A.[154] Further, Comcast added a hunting license provision that allowed additional systems to carry MASN at Comcast's discretion.[155] Moreover, MASN was represented by experienced sports consultants and MASN's outside counsel reviewed the draft and Schedule A.[156] Peter Angelos, who is also an accomplished attorney, sophisticated sports negotiator, and owner of the Orioles, then signed and initialed each page of the Agreement.[157] Given these circumstances, it defies common sense for MASN to suggest that Comcast somehow misled it.[158] MASN does not argue that the Settlement

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[152] Comcast Exh. 5 at 10, 16 ¶ 2, 18-19 ¶ 4(B) (Settlement Agreement and Release); Tr. 6836:13-6837:6 (Bond); Tr. 6839:9-11 (Judge Sippel).

[153] *See* MASN PFC at 19-40.

[154] Comcast Exh. 5 (Settlement Agreement and Release); Comcast Exh. 1 at 6 ¶ 16 (Bond).

[155] Comcast Exh. 5 at 1.

[156] Comcast Exh. 15.

[157] Comcast Exh. 1 at 7, ¶ 17 (Bond); Tr. 5932:13 - 5933:12 (Wyche).

[158] MASN claims that (i) Comcast "secretly excluded" systems from Schedule A and (ii) Comcast failed to provide a reliable explanation regarding the formation of Schedule A. MASN RFC at 8-10 ¶¶ 171-74, 13-15 ¶¶ 184-87. Both claims are without merit. The contract is clear on its face – Schedule A was designed to list all systems *included* in the mandatory carriage obligation. Nothing in the 2006 Settlement Agreement specifies which systems are excluded from Schedule A and the record demonstrates that MASN never asked Comcast what specific systems were not listed in Schedule A. Tr. 5957:3 – 5958:1, 5980:15 – 5981:15 (Wyche). If MASN never showed an interest in the specific systems excluded from Schedule A, it is hard pressed to claim that Comcast somehow secretly excluded those systems. Further, despite MASN's claim, Comcast provided substantial evidence regarding the formation of Schedule A. Tr. 6882:14-6883:7 (Bond); 6454:18-22, 6598:16-18 (Ortman). Mr. Ortman testified extensively about the process utilized to develop Schedule A, including the factors used to determine which systems to include in the Schedule. Comcast Exh. 2 at 3-5 ¶¶ 8-10, 14 (Ortman); Tr. 6455:4 – 6460:8 (Ortman). Mr. Ortman's testimony that Ms. Gaiski generated Schedule A based on the factors he supplied is corroborated by a contemporaneous email from a member of Ms. Gaiski's group – Ryan Smith – transmitting the final version of Schedule A. Tr. 6579:14 – 6598:18 (Ortman); Comcast Exh. 11. There also is record evidence that clearly indicates that Ms. Gaiski was coordinating with Mr. Ortman regarding which systems to include in a proposal to MASN. Comcast Exh. 9 at 1 (email chain).

Agreement was unclear or ambiguous in any respect. At most, the evidence demonstrates that MASN failed to exercise reasonable due diligence, which explains why MASN has an understanding of the Settlement Agreement that differs from Comcast's and the express terms of the Agreement.[159] The conflicting understandings are resolved by the integration clause drafted by MASN – MASN's understanding is barred because it is based entirely on alleged oral representations.

62. MASN's allegations of improper differential treatment by Comcast between MASN and Comcast's own affiliated RSNs are also unsupported by the evidence and do not support an inference of unlawful discrimination.[160] Moreover, none of the alleged examples offered by MASN relate to the post-2006 period. Some level of differential treatment is inherent in the statutory scheme under which Congress permitted vertical integration. Indeed, both Congress and the Commission have recognized the benefits associated with vertical integration.[161] Thus, it is not enough for MASN to show that Comcast did not treat MASN and CSN-MA/CSN-P identically in all respects. Rather, MASN must show that the differences were based on discrimination by Comcast against MASN on the basis of non-affiliation in 2007 and 2008 when Comcast decided not to launch MASN on systems not set forth in Schedule A of the Settlement Agreement.

63. Comcast's conduct prior to August 2006 is wholly irrelevant here. For example, issues relating to Comcast's interest in continuing to carry the Baltimore Orioles were resolved by the Settlement Agreement and have no bearing on this matter.[162] In addition, MASN's continued reference to these matters further bolsters the point that this case is about issues that arose prior to 2007 and should be dismissed under the statute of limitations.

64. In sum, the Presiding Judge finds that MASN has failed to carry its burden to establish by a preponderance of the evidence that Comcast's carriage decisions in 2007 and 2008 (or even earlier) related to MASN were motivated by affiliation or non-affiliation. To the contrary, and as discussed below, Comcast presented conclusive evidence that it had non-

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[159] *See* para. 37 *supra*.

[160] MASN PFC at 41-48.

[161] *See* S. Rep. No. 102-92 at 26-27, 81 (1991); H. R. Rep. No. 102-628 at 41(1992); *Implementation of Sections 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Vertical Ownership Limits, Memorandum Opinion and Order on Reconsideration of the Second Report and Order*, 10 FCC Rcd 7364, 7365-66 (1995).

[162] *See* Comcast Exh. 5 at 17-18 ¶ 4(A). MASN also claims that Comcast's decision to drop CSN-MA, which at the time had the rights to Orioles programming, in Harrisburg was (i) made only after "it determined that it would not be able to renew those rights" and (ii) "based on a desire to advance the interests of CSN-Philly." MASN RFC at 20 ¶ 202, 66 n.286. MASN cites no record evidence in support of its claims, and for good reason. The record demonstrates that CSN-MA was dropped based on cost, lack of fan interest, and a demand to be moved from the system's sports-tier to its expanded basic tier. Comcast Exh. 2 at 8 ¶ 19 (Ortman).

discriminatory justifications for its carriage decisions. MASN failed to demonstrate that these justifications were pretextual.

Comcast's Legitimate, Non-Discriminatory Justifications

65. The evidence adduced at trial demonstrates that Comcast's carriage decisions related to MASN were founded on legitimate, non-discriminatory business concerns. Comcast presented evidence demonstrating that its initial decision during the 2006 negotiations not to carry MASN on all Comcast systems in MASN's territory was based on a legitimate desire on the part of Comcast to limit carriage based on costs, demand, and bandwidth.[163] Comcast also had a sincere desire to settle its dispute with MASN and thus intended to provide carriage that would be sufficient to enable MASN to meet its subscriber goals.[164] Comcast therefore developed Schedule A to identify specifically which of its systems would carry MASN and when they would begin doing so.[165]

66. The evidence shows that Comcast decided which systems to include in Schedule A on the basis of objective, non-affiliation-based criteria — bandwidth, recent history of carrying Orioles games, proximity to Baltimore and Washington, and MASN's high price.[166] MASN failed to demonstrate that any of these reasons were pretextual. Indeed, MASN admits that Comcast raised concerns about lack of consumer demand and bandwidth constraints contemporaneously with MASN's raising of carriage concerns in 2007.[167] The record demonstrates that MASN officials knew of these concerns long before execution of the 2006 Settlement Agreement.[168] These facts underscore that Comcast's reasons for not carrying MASN on the unlaunched systems were not pretextual with respect to the period MASN claims is at issue in this case.

67. Comcast's subsequent carriage decisions related to MASN were founded on Comcast's reasonable and good faith interpretation of its obligations under the Settlement Agreement and Release. As discussed above, it is undisputed that Comcast's discussions with MASN in 2007 and 2008 were founded entirely on the parties' differing interpretations of Comcast's carriage obligations under the Settlement Agreement and Release. The evidence demonstrates that Comcast had a reasonable and good faith belief that the Settlement Agreement

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[163] Comcast Exh. 2 at 5-6 (Ortman); Comcast Exh. 21 at 1-2; Tr. 6456:2-13, 6596:2-16 (Ortman).

[164] Tr. 6885: 21 – 6886:8 (Bond) (indicating that he was trying to reach a settlement with MASN).

[165] Comcast Exh. 1 at 6 ¶ 16 (Bond); Comcast Exh. 2 at 4 ¶¶ 10-12 (Ortman); Comcast Exh. 18; Tr. 6454:18 – 6455:16 (Ortman); Tr. 6733:10-19, 6734:15-19, 6963:3-16 (Bond).

[166] Comcast Exh. 2 at 5-6 ¶ 15, 15 ¶ 36 (Ortman); Comcast Exh. 21 at 1-3; Tr. 5789:13-5790:9 (Cuddihy); Tr. 6454:5 – 6458:1 (Ortman); Comcast PFC at 24-25 ¶ 46.

[167] *See* MASN PFC at 50-51 ¶ 111, 97 ¶ 489 (demand); *id.* at 96 ¶ 56 (bandwidth).

[168] Comcast Exh. 21 at 1-2.

and Release obligated Comcast to carry MASN only the systems listed in Schedule A.[169] Indeed, that is what the Settlement Agreement expressly stated. Because the Harrisburg, Roanoke-Lynchburg, and Tri-Cities systems at issue here do not appear on Schedule A, Comcast concluded that it had no obligation to carry MASN on those systems. Such reliance on the Settlement Agreement is not only reasonable and non-discriminatory, but consistent with the Commission policy encouraging the private settlement of disputes.[170] Indeed, allowing MASN to use the instant Complaint to modify the settlement of a prior complaint nearly three years ago would undermine this pro-settlement policy.

68. Moreover, the record demonstrates that MASN did not ask anew for carriage under the "at discretion" (*i.e.*, hunting license) provision in the Settlement Agreement. And, even if it had done so, the evidence shows that Comcast had legitimate, non-discriminatory, business reasons for deciding not to carry MASN on the unlaunched systems. Comcast's decisions in this regard were based on input from local system managers who could make informed judgments about whether carrying MASN made business sense, whether there was subscriber demand for MASN, whether the costs to the system were too high, and whether the system had adequate available bandwidth.[171] Comcast presented evidence showing that, where local managers of systems not listed on Schedule A asked for authority to carry MASN, Comcast agreed.[172] The evidence shows, however, that none of the local managers of the systems at issue here asked Comcast's management to approve carriage of MASN.[173] It is simply not discriminatory for Comcast to rely on the judgment of its local managers in determining whether carrying MASN or any other network represents a good business value for Comcast and its subscribers.

69. To summarize, the Presiding Judge finds that MASN has failed to satisfy its burden of proof that Comcast engaged in affiliation-based discrimination against MASN, particularly with respect to the 2007-2008 period MASN claims is at issue here.

Unreasonable Restraint on MASN's Ability to Compete Fairly

70. The second element that MASN must establish to prove a violation of Section 76.1301(c) is that Comcast's alleged discriminatory course of conduct has unreasonably

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[169] Comcast Exh. 1 at 9 ¶ 24 (Bond); Comcast Exh. 17.

[170] MASN incorrectly claims that the Media Bureau rejected reliance on the 2006 Settlement Agreement as a defense to the Complaint. MASN RFC at 40-41 ¶ 126. The *HDO* recognized that Comcast would be raising contract-based defenses to the Complaint and those defenses were never addressed – instead they were left for resolution by the ALJ. *See HDO*, 23 FCC Rcd at 14837-41 ¶¶ 111-18.

[171] *See* Comcast Exh. 59 at ; Comcast Exh. 60 at 1; Comcast Exh. 63 at 1; Comcast Exh. 64 at 1; Comcast Exh. 65; Comcast Exh. 58 at 1; *see also* Comcast Exh. 2 at 13 ¶ 29 (Ortman); Comcast Exh. 12 at 1.

[172] Tr. 6957:13-20 (Bond).

[173] Comcast Exh. 1 at 10 ¶ 30 (Bond).

restrained MASN's ability to compete fairly. Having concluded that Comcast did not unlawfully discriminate against MASN on the basis of affiliation or non-affiliation, the Presiding Judge need not reach the question of whether any such discrimination unreasonably restrained MASN's ability to compete fairly. Nevertheless, the Presiding Judge will address the second issue so as to provide a more complete analysis of the case to the Commission.

71. Neither Section 616 of the Act nor Section 76.1301(c) of the Commission's rules provide measures by which the Presiding Judge is to evaluate whether MASN's ability to compete fairly has been unreasonably restrained. Nevertheless, simple common sense dictates that the use of the words "unreasonably" and "fairly" in the statute and the rule necessarily impose some limitations on the circumstances that constitute a violation of Section 76.1301(c).[174] Otherwise, all refusals of carriage would automatically satisfy this element of a complainant's burden of proof and render these statutory limitations superfluous. In any event, it is clear from the evidence presented in this case that, under any standard, MASN has failed to show that Comcast's carriage decisions unreasonably restrained MASN's ability to compete fairly.[175]

72. There is no evidence that the lack of carriage to 13 percent of Comcast's subscribers in any way hampered MASN's ability to acquire the rights to telecast games of any professional sports teams. To the contrary, MASN acknowledged at trial that it failed to secure the rights to the Redskins pre-season games because it did not bid enough — not because of gaps in coverage on Comcast systems.[176] Furthermore, MASN successfully outbid Comcast for the rights to carry Baltimore Ravens pre-season games despite the lack of carriage in the contested systems.[177] Moreover, MASN's ability to compete for sports programming is obviously robust given the fact that it is owned by the Nationals and the Orioles.[178]

73. In addition, MASN failed to show that its ability to sell advertising has been impaired by lack of carriage to 13 percent of Comcast's subscribers. The Presiding Judge finds

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[174] 47 C.F.R. § 76.1301(c).

[175] Perhaps recognizing this deficiency, MASN claims that the lack of evidence regarding harm "was Comcast's failing, not MASN's." MASN RFC at 26 ¶ 214. It is MASN that bears the burden on this issue, however.

[176] Tr. 5779:7-15 (Cuddihy). The record demonstrates that MASN decided not to outbid Comcast for programming rights for the Washington Redskins, but did outbid Comcast for the programming rights for the Baltimore Ravens. Tr. 5778:3 – 5779:15 (Cuddihy). Based on this evidence, MASN states "[i]t is undisputed that . . . MASN could not outbid Comcast" for Redskins rights. MASN RFC at 25 ¶ 212. There is *nothing* in the record to support the conclusion that MASN *could not* outbid Comcast for these rights, just as it did for the Ravens rights.

[177] Tr. 5777:20-5778:12 (Cuddihy).

[178] Tr. 5952:5-10 (Wyche).

MASN's anecdotal, hearsay evidence that coverage gaps have impaired its ability to secure advertising to be unreliable and entitled to no weight.[179]

74. Finally, there is no evidence that Comcast's carriage decisions impose significant, concrete financial hardship on MASN. MASN's own economic expert acknowledged that MASN is highly profitable[180] and Comcast's expert, Mr. Orszag, provided extensive evidence that Comcast's decision not to carry MASN on systems constituting only 13 percent of MASN's potential subscribers on Comcast systems, accounts for only a very small share of MASN's potential licensing revenue and does not cause any significant adverse effect on MASN's ability to compete.[181]

Remedy

75. The *HDO* directed the Presiding Judge to recommend an appropriate remedy upon a finding that Comcast violated Section 76.1301(c) of the Commission's rules has occurred.[182] Because MASN has failed to meet its burden to prove that Comcast unlawfully discriminated on the basis of affiliation or non-affiliation, there is no need to address the parties' submissions on the issue of an appropriate remedy. Again, however, in order to provide the Commission with the fullest analysis of this case, the Presiding Judge will state his recommendation regarding the remedy that would be appropriate had a violation been proven against Comcast.

76. Section 616(a)(3) of the Communications Act and Section 76.1301(c) of the Commission's rules authorize the leveling of "appropriate penalties and remedies for violations…, including carriage." While the Commission thus has the authority to force an MVPD to carry a service it has otherwise declined to carry, Comcast makes a convincing case that the First Amendment establishes a very high threshold before the government can mandate carriage of particular content. Thus, out of deference to these First Amendment concerns and in order to ensure that any remedy is "narrowly tailored to serve a compelling state interest," the Presiding Judge concludes mandatory carriage is not appropriate even if the Commission finds a violation.

77. The Presiding Judge's conclusion is further guided by the fact that this case involves a private contract governing the carriage relationship between MASN and Comcast. The Settlement Agreement was negotiated and executed by the parties, and the Commission should not be in the business of rewriting such agreements. There is simply no justification in law or policy for the Commission to rewrite an agreement to mandate carriage to which the parties did not agree. Moreover, for the Commission to undo an agreement that *settled* litigation

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[179] *See* MASN Exh. 235 at 12 ¶ 42 (Cuddihy) (setting forth a single sentence on the topic with no support).

[180] Tr. 6275:8-6277:4 (Singer); *see* Comcast Exh. 87 at 1-4 (MASN financial statement).

[181] Comcast Exh. 4 at 25 ¶ 45, 26 ¶ 47 (Orszag).

[182] *HDO,* 23 FCC Rcd at 14845 ¶ 142, issue (b).

between the parties would create strong disincentives for settlements in the future. Litigants would conclude that there is little point in negotiating a compromise if the Commission is free to rewrite the deal years later.

78. In light of these considerations, the Presiding Judge concludes that MASN's demand for mandatory carriage is entirely unwarranted, even had MASN proven a violation of Section 76.1301(c). If the Commission does decide to mandate carriage in this case, the Presiding Judge recommends that the Commission not require Comcast to carry MASN on any system that currently lacks capacity to do so — either because of other programming that would have to be removed from customers, or because a system rebuild would be necessary.

79. Further, any mandatory carriage of MASN should be limited to carriage on a sports tier with a license fee that does not exceed that charged by CSN-MA in the same area. Mandating carriage on Comcast's expanded basic tier would place a much higher burden on Comcast's editorial discretion and would also raise the cost of providing expanded basic service to the vast majority of Comcast's customers in the affected areas. In addition, carriage on a sports tier would allow the subscribers in the contested systems in MASN's territory who wish to watch Orioles and Nationals games to purchase MASN programming without imposing additional costs on all other subscribers in those areas.

80. In no event, however, should the license fee for the contested systems exceed the rates specified in the Settlement Agreement for the fringe regions within which the contested systems are located. If some other rate is mandated, numerous other terms (*e.g.*, term, launch dates, renewal rights, advertising, marketing support, Most-Favored-Nation) will remain to be negotiated between the parties.

RECOMMENDED DECISION

81. Based on the foregoing findings of fact and conclusions of law, the Presiding Judge recommends that the Commission dismiss with prejudice MASN's program carriage complaint against Comcast as barred by the statute of limitations and the doctrine of *res judicata*. To the extent that the Commission deems it appropriate to reach the merits of MASN's complaint, the Presiding Judge finds that MASN failed to meet its burden to prove that Comcast unlawfully discriminated in the selection, terms or conditions for carriage of video programming provided by MASN, let alone in a manner that unreasonably restrained MASN's ability to compete fairly, in violation of Section 76.1301(c) of the Commission's program carriage rules. Consequently, mandatory carriage of MASN's programming service on Comcast's systems is not warranted. The Presiding Judge therefore recommends that to the extent the Commission reaches the merits, it deny the above-captioned carriage complaint.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Chief Administrative Law Judge